

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY KEITH BERRY,

Defendant-Appellant.

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UNPUBLISHED

June 18, 2013

No. 308408

Wayne Circuit Court

LC No. 11-008978-FH

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant, Gregory Keith Berry, appeals as of right his conviction, following a jury trial, of first-degree home invasion.<sup>1</sup> The trial court sentenced Berry as a fourth offense habitual offender<sup>2</sup> to serve six to 20 years' imprisonment. We affirm.

**I. FACTS**

Danyel Smith-Jackson testified that at about 1:00 p.m. on August 16, 2011, she was watching television in her bedroom when she saw a person walk past her bedroom door. According to Smith-Jackson, she opened the door and yelled, and she saw a man standing about 10 to 12 feet away with a large black bag cradled in his arms. When she yelled, the man turned around, was startled, and then ran out of the house. Smith-Jackson called the police and described the man as bald and dark-skinned. She testified that her home had been broken into four days before, and that her neighbor had told her that the man was a bald and dark-skinned.

Smith-Jackson testified that, on August 26, 2011, she and her neighbor went looking for the man. Smith-Jackson testified that she was about half a mile from her home when she saw and recognized Berry. She called the police, but Officer Robert Torres of the Detroit Police Department informed her that he could not arrest anyone until she filed a police report. Smith-Jackson testified that she went to the police station, filed a police report, and identified Berry in a photographic lineup. Officers subsequently arrested Berry.

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<sup>1</sup> MCL 750.110a(2).

<sup>2</sup> MCL 769.12.

Before trial, defense counsel moved that the trial court either exclude the testimony of Essie Jackson, Berry's probation officer, or exclude her title as irrelevant and unfairly prejudicial. Defense counsel contended that Jackson's title would make the jury aware that Berry had a prior conviction. The trial court (1) ruled that it would instruct the jury concerning Berry's prior conviction, (2) denied Berry's motion, and (3) ruled that it would exclude Jackson's title from the evidence.

At trial, Sergeant Stephen Howell testified that, during an interview, he asked Berry where he was at 1:00 p.m. on August 16, 2011. Defense counsel renewed his challenge to the testimony's relevance. The trial court allowed Sergeant Howell to testify that Berry told him that he was with his probation officer.

Jackson subsequently testified that she was a probation officer with the Michigan Department of Corrections and had been supervising Berry's probation. Jackson testified that on August 16, 2011, Berry signed in at 10:57 a.m., she spoke with him for 10 or 15 minutes, her next appointment arrived at 11:33 a.m., and Berry left before that appointment. Kim Algers, Berry's ex-girlfriend, testified that she saw Berry at around 11:30 a.m. or 12:00 p.m. on August 16, 2011, and that Berry told her that he came from meeting his probation officer. Algers testified that she was with Berry for about 30 minutes.

The jury found Berry guilty of first-degree home invasion.

## II. BERRY'S STATUS AS A PROBATIONER

### A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a preserved challenge to a trial court's evidentiary ruling.<sup>3</sup> The trial court abuses its discretion when its result falls outside the range of principled outcomes.<sup>4</sup> This Court reviews de novo preliminary questions of law concerning the rules of evidence.<sup>5</sup>

### B. LEGAL STANDARDS

The trial court may only admit relevant evidence.<sup>6</sup> Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.<sup>7</sup> But even when the evidence is relevant, the trial court may not admit it if the danger of its prejudicial effect

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<sup>3</sup> *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> MRE 402; *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

<sup>7</sup> MRE 401; *Schaw*, 288 Mich App at 236-237.

substantially outweighs its probative value.<sup>8</sup> The prejudicial effect of the evidence substantially outweighs its probative value when evidence is only marginally probative, but the trier of fact may give it undue or preemptive weight.<sup>9</sup>

### C. APPLYING THE STANDARDS

Berry contends that the trial court erred when it ruled that it would exclude the evidence of Jackson's title, but then allowed witnesses to testify that she was a probation officer without considering the evidence's probative value and prejudicial effect. The state contends that the trial court denied Berry's motion to exclude the evidence, and did not err by doing so.

We conclude that the trial court abused its discretion by failing to consider the relative weights of the prejudicial effect and probative value of admitting Jackson's title. Evidence of the defendant's consciousness of guilt is relevant and may be highly probative.<sup>10</sup> The defendant's status as a convict may be probative of consciousness of guilt when the defendant uses that statement to manipulate a witness.<sup>11</sup> The trial court is in the best position to assess the relative weight of the probative value and prejudicial effect of the evidence.<sup>12</sup> When considering an evidentiary challenge under MRE 403, the trial court should explain its conclusions concerning those weights.<sup>13</sup>

The disputed evidence here was Jackson's title as a probation officer. It is unclear from the record whether the trial court intended to exclude this evidence, but it is clear that trial court did not comment on the evidence's probative value or prejudicial effect. After defense counsel argued that the trial court should exclude the evidence on the basis that its prejudicial effect substantially outweighed its probative value, the trial court ruled as follows:

I am going to instruct them because he has a prior conviction. They will follow that instruction.

I will *deny the Motion to have the title*.

What is the witness[']s name?

Miss Jackson, *we will have her title excluded from the evidence*.

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<sup>8</sup> MRE 403; *Schaw*, 288 Mich App at 237.

<sup>9</sup> *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008); *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

<sup>10</sup> *Schaw*, 288 Mich App at 237-238.

<sup>11</sup> See *Id.*

<sup>12</sup> *Blackston*, 481 Mich at 462.

<sup>13</sup> See *People v Danto*, 294 Mich App 596, 602-603; 822 NW2d 600 (2011); *Crawford*, 458 Mich at 398.

During Sergeant Howell's testimony, after he began reading his transcript of his interview with Berry, defense counsel renewed the "questions under [MRE] 403." Defense counsel noted that he had raised the issue during his motion in limine. The trial court responded, "All right. That is good." Sergeant Howell subsequently testified that Berry told him that he was with his probation officer. We conclude that the trial court abused its discretion when it entirely failed to consider the relative weights of the probative value and prejudicial effect of this evidence.

However, we conclude that any error was harmless. This Court will reverse on the basis of a preserved, nonconstitutional error only if the error resulted in a miscarriage of justice.<sup>14</sup> An error results in a miscarriage of justice when "it is more probable than not that a different outcome would have resulted without the error."<sup>15</sup>

Here, the primary element in dispute at the trial was the robber's identity. Smith-Jackson testified that she saw Berry in her house, subsequently saw him on the street and recognized him immediately, and picked him out of a photographic lineup. Witnesses mentioned Jackson's status as Berry's probation officer only as it related to whether Berry was with her at the time of the home invasion. Additionally, the trial court instructed the jury that it "should not convict the defendant in this case because he has been convicted in a case on a prior occasion." This Court presumes that jurors follow their instructions.<sup>16</sup> This instruction would mitigate any prejudicial effect of the evidence of Jackson's status as a probation officer.

This Court's recent decision in *People v Snyder*<sup>17</sup> does not affect our decision in this case. That case concerned a defendant who challenged the prosecution's admission of a prior conviction under MRE 609.<sup>18</sup> MRE 609 allows a party to impeach a witness's credibility with evidence of a prior conviction, and requires the trial court to determine whether a defendant's prior conviction has "significant probative value on the issue of credibility."<sup>19</sup> The trial court failed to articulate why the defendant's prior conviction was admissible.<sup>20</sup> This Court reversed the defendant's conviction because evidence of the defendant's prior conviction was not significantly probative concerning his credibility, and the risk of prejudice was particularly high where the offenses were identical.<sup>21</sup> This Court opined that the evidence undermined the reliability of the verdict because the case "presented a true one-on-one credibility contest" where

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<sup>14</sup> *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

<sup>15</sup> *Id.*

<sup>16</sup> *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 676 (2011).

<sup>17</sup> *People v Snyder (After Remand)*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2013) (Docket No. 310208).

<sup>18</sup> *Id.* at \_\_\_, slip op p 2.

<sup>19</sup> MRE 609(a)(2)(B).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \_\_\_, slip op pp 4, 6.

the victim testified that the defendant stole the items, but the defendant testified that the victim gave the items to him.<sup>22</sup>

Here, Berry challenged the admission of the evidence under MRE 403. MRE 403's standard is opposite that of MRE 609's standard—MRE 403 requires that the prejudicial effect of the evidence substantially outweigh its probative value, while MRE 609 requires that the evidence have a significant probative value. There was no testimony that the offense for which Berry was on probation was identical to the offense that he was accused of in this case, and as explained above, that Berry was on probation was incidental to the testimony, not the subject of it. And here, the evidence did not involve a one-on-one credibility contest. Several witnesses testified concerning Berry's whereabouts that day.

We conclude that the admission of this evidence did not result in a miscarriage of justice. Considering Smith-Jackson's testimony concerning Berry's identity, the jury instruction, and the use of the challenged evidence, it is not more probable than not that a different outcome would have resulted had the trial court excluded the evidence.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

#### A. STANDARD OF REVIEW

When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.<sup>23</sup>

#### B. LEGAL STANDARDS

To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.<sup>24</sup> The defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.<sup>25</sup>

#### C. APPLYING THE STANDARDS

Berry contends that defense counsel's performance was unreasonable when (1) he failed to follow up on the trial court's ruling to exclude Jackson's status as a probation officer, and (2) he failed to obtain a limiting instruction concerning that testimony.

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<sup>22</sup> *Id.* at \_\_\_, slip op p 7.

<sup>23</sup> *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

<sup>24</sup> *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

<sup>25</sup> *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

The record does not support Berry's contentions. Defense counsel renewed his challenge to the relevance of the evidence, and did receive an instruction concerning Berry's status as a probationer. Further, "there are times when it is better not to object and draw attention to an improper comment."<sup>26</sup> Here, there was no reason for defense counsel to continue objecting to any mention of Jackson's status as a probation officer after the trial court allowed testimony on that point. The issue was already preserved. Thus, we reject Berry's argument that his counsel's performance was somehow deficient.

We affirm.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

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<sup>26</sup> *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008), quoting *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995).